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Russell, Isaac Franklin

Childhood and the new
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Childhood and the New Penology

AN ADDRESS

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BY

ISAAC FRANKLIN RUSSELL, LL.D., D. C. L.

Chief Justice of the Court of Special Sessions
of the City of New York

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Childhood and the New Penology

THE vendetta or its equivalent has existed in all quarters of the known world. Criminal procedure in its earliest forms is based on the personification of vengeance; and the law aims to reproduce the penalties naturally enforced by a system of self-redress.

The earliest literary suggestions of legal sanction are found in the scenes of legal procedure depicted by Homer on the shield of Achilles. In the noble poem of Job we hear the Oriental patriarch soliloquizing "I know that the avenger of blood liveth," thus exhibiting the reliance placed in his early day on private vengeance for the punishment of crime.

Modern penology ignores the demands of merely retributive justice and seeks to accomplish the amendment of offenders through reformatory agencies. The juvenile delinquent is not regarded as a criminal, but as a child who needs the care and protection of the state. The amelioration of social conditions is sought through education and repression rather than by penal seclusion and punitive discipline.

Medical practitioners led the way in this reform by emphasizing prophylaxis as against therapy. Disease is now attacked at the germ stage; the modern practitioner finds that drainage and sterilization and vaccination are more effective in maintaining public health than is heroic surgery.

In like manner the students of social organisms seek the source and origin of evils that they may

assail them at their first appearance. This is pre-eminently the epoch of the child. The scientist studies the psychology of the child mind before it bends to the pressure of education. Just as Froebel and Pestalozzi found in these phenomena the materials of their educational philosophy, so penologists, who are up-to-date, busy themselves with the manifestations of juvenile delinquency. Boys are found noisy under the demands of physiological forces; girls are found to giggle and to exhibit an instinctive passion for motherhood and home building. Children of both sexes when healthy are fond of play and generally reveal impulses toward romantic fiction or lying, falsely so-called. To ignore these natural tendencies is to rob childhood of its just inheritance. Men seldom change their habits after reaching fifty years of age; but there is always hope of a child that he may mend his ways. A vast mass of legislation is now developing that seeks to insure the moral safety as well as the physical well-being of the young. This is illustrated in statutes regulating compulsory education, the employment of children in factories, the sale of liquor to minors and corrupting the morals of a child.

One of the saddest features of the criminal administration of the past is the stigma of criminality which the old law sought to render ineffaceable by a scarlet letter or a fleur-de-lis, branded on the bosom or forehead of an offender to mark his identity. Surveillance of the police and circumscribed habitat completed the doom of the transgressor and forever shut him off from the uplifting influences of decent society. Modern penology seeks to save the criminal from this awful fate. In the case of young children even the odious word *criminal* is

avoided. Felonies and misdemeanors, so-called, vanish and give place to juvenile delinquency. This pedantic euphemism never deceives the boy at the bar. He knows whether he is charged with burglary or not and quickly forgets the Latin phrase which glosses over this odious offence. In harmony with these views and to promote the rehabilitation of discharged prisoners an effort is now made to conceal the record of past delinquency from the merely curious, to obscure the personality of a convict under the cloak of a numerical designation and to hide the records of probation discipline from all except court and public officials.

Learned opinion is still divided on many points of interest involved in criminal procedure. Lombroso taught that there is a distinct criminal type, recognizable by anthropometric devices. Sincere and honest students of Lombroso's facts utterly reject his conclusions. It may well be that what is called crime or vice should be treated pathologically instead of morally. School teachers have often observed that failure that has generally been charged to moral obliquity is often due to defective vision. Eyeglasses have been found to promote proficiency in study that rods of hickory and birch failed to stimulate. Adenoids are said by some authorities to impel irresistibly to truancy and *wanderlust*; other observers fail to find in facts and figures gathered at truant schools anything to justify this conclusion.

Guilty motive is necessary to crime as we understand it; hence any morbid criminal propensity, such as dipsomania, kleptomania, pyromania and nymphomania might well be regarded as an excuse for

what seemed a wrongful act. Voluntary intoxication, of course, would be on a different basis.

Under the modern practice juvenile courts are not held in buildings where adult criminals are condemned, uniformed policemen are not found at trials except in the capacity of witnesses and detention rooms for children take the place of the gloomy dungeons where hardened offenders are incarcerated.

It is pleasant to hear that environment is more important than heredity in influencing and determining criminal guilt. If it is now too late to select our ancestors, it remains entirely possible to change our environment. In reality, what is glibly called juvenile delinquency might, with quite as much accuracy, be styled parental delinquency; at least, we can say that three-quarters of all the cases that crowd the calendars of the Children's Court in New York are the direct result of improper guardianship. When the child's environment becomes what it should be the aid of the court is no longer needed.

Expert opinion is divided as to physical conditions that should surround the juvenile court, whether the judge should wear a silk robe, whether he should sit on a throne of judgment or meet the delinquent in his chambers, and whether a stenographer should attend and record every spoken word. In a great metropolis like New York the policeman, with his uniform and shield, his baton and gold lace, is often the only conspicuous representative of the law; and the courts of lower jurisdiction are the only tribunals of justice to which the poor and humble are likely to pay a visit. In a democratic society, where the army is of insignificant proportions and where we have no hereditary sons of

privilege, the only hope of civilization is a widespread and sincere reverence for law and for the temples and ministers of justice. Anything appealing to the eye and adding dignity to judicial surroundings is thus a direct aid to the administration of the law. Especially is this true where there is a large population of alien birth and descent familiar with the robes and pomp and circumstance of judicial sittings. A red gown may be dispensed with; so may chariots and heralds and criers to proclaim the appearance of the judge. If his honor, the presiding justice, must go to court in a trolley car, holding on to a strap, still when he reaches the seat of judgment he may well forego any rude and vulgar proceedings which tend to impair the dignity and cheapen the worth of his holy functions. Some faddists are laboring to make the juvenile court a place of social or religious functions, to which, in time, the judge will be an unnecessary appendage. Others, with more reason, we think, contend that as long as it assumes to fine and imprison it must remain a court of criminal jurisdiction.

Many perils threaten the course and development of the juvenile court. One of these is that it may become a fad. Pseudo philanthropy may find in the juvenile court a means to display the charities of religion in an ostentatious and spectacular way. Worthy men and women in every community who have leisure and a penchant for doing good come to regard the Children's Court as worthy of their condescending patronage and are eager to become probation officers and big brothers without pay. This is not an unmixed evil. Still those to whom the work of the Children's Court is a life's labor

and not a passing fad can easily observe that in the long routine of weeks and months little reliance can be placed on the efficiency of unpaid helpers. Many volunteer probation officers owe a higher allegiance to some organization, social or religious, by which they are appointed and cannot fully meet the requirements of an office where judicial authority must always be paramount.

When once we are well rid of the old notion that atonement and expiation are the end and aim of penal justice we can see the value of probation and parole in a system of criminal justice. Under this benign procedure the offender, instead of being embastilled in a dungeon or fortress, is enlarged and allowed the full liberty of the free air so long as he respects the terms of his parole. If his besetting sin is drunkenness, gambling or evil companionship the judge who sends him home to his family and employer may make his freedom contingent on his continued good behavior. This enables a convict to work out his own salvation and learn the lesson of wise and honorable self-direction. Moreover, the home is not broken up and earnings are saved for family expenses.

The indeterminate sentence is in line with this policy of moral rehabilitation of delinquents. Human character is found in such infinite variety that no fixed period of confinement or uniform regime of discipline can be safely pronounced as invariably the best. Progress in moral reform advances in accordance with the character and antecedents of the individual, sometimes faster, sometimes slower. This enables the prison authorities to exercise a wide range of discretion in continuing or terminating the confinement of the prisoner accord-

ing to the capacity he develops for intelligent self-direction. Still many English students of the American penal system are unalterably opposed to the indeterminate sentence. Enforcing restitution for property unlawfully taken or destroyed by youthful miscreants is a necessary part of a plan for moral reform. The judge has the power by statute to enforce payments in money, by installments, if necessary, till such restitution shall have been fully made.

For some years past the interest of penologists in psychopathic and psychiatric analysis and experimentation has been great and growing. And now we recognize that what is sometimes called crime or delinquency, and what at best is an unfortunate happening, may be treated pathologically instead of morally and may be conceived as the necessary result of irresistible physical forces rather than the deliberately chosen end of voluntary moral action. Definitely known drugs stimulate sleep, thirst and various animal appetites; other drugs suppress these energies. Music and visions, rest, quiet and summer skies sooth and calm the mind and nervous system, disordered and weakened by the stress and strain of prolonged labor and excitement. Tonsils, appendices and adenoids are often sacrificed with beneficial results. In this way medicine and surgery contribute to solve the problems of the criminologist.

Abnormal man frequently appears at the bar of criminal tribunals; and common justice demands that we make a scientific estimate of his capacity for what we have been in the habit of calling free moral action. Does he know the nature and quality of the act which he has committed and for which he has been arraigned? This is the crucial question. It

can only be answered by the trained scientific observer; and in many instances only after prolonged and patient investigations. This demands laboratories with expensive apparatus and equipment and a staff of specially trained experts. Progress in such a field must necessarily be slow. Theorists and faddists, actuated by an honest but misguided enthusiasm, can only delay and embarrass the work of reform. Not all the defendants who appear in the Children's Courts need the services of these trained experts. The impulses that prompt a boy to take an apple and eat it, to leave school for the playground and to seek the companionship of spirits kindred to his own, are pretty well known and accurately estimated by the judges of juvenile courts who have been called upon to adjudicate thousands of cases. But the exceptional case does appear, perhaps daily in a city like New York, when the last word and the best word of the skilled psychiatrist must be spoken.

Apart from nicety of technical speech we may say that all crimes save homicide are within the jurisdiction of the Children's Court. Offenses that would be felonies if committed by adults are juvenile delinquencies when committed by children under sixteen years of age. Judge Lindsay's court in Denver has jurisdiction over infants under twenty-one years of age and includes murder cases in the first degree within its competence. As many as twenty-two States in the Union now have the Children's Court.

Progress in penology is still going on. The end is not yet. Utopia with its dull and debasing monotony of undeviating virtue is still invisible beyond the horizon. Moral crises still confront the

individual and the public. Evil will be with us always. Jacob will rob his brother in ages that await us. Delilahs will shear the Samsons of tomorrow of their locks of strength; intemperance and every vice will claim its victims. But the outlook is infinitely more hopeful because of the salvage in the wrecks of childhood that is being made every day by the juvenile court.

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